

E-FILED - 3/20/09

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

David Luther GHENT, Petitioner, v. Robert K. WONG, Acting Warden of San Quentin State Prison ¹ , Respondent.	Case Number 5-90-cv-2763-RMW <u>DEATH-PENALTY CASE</u> ORDER GRANTING IN PART AND DENYING IN PART PETITIONER'S MOTION TO SEAL PORTIONS OF THE RECORD [Doc. No. 351]
--	---

In the above-captioned capital habeas action, the Court issued a Protective Order, (Doc. No. 289), and a subsequent Order Modifying Protective Order (“Modified PO”), (Doc. No. 326), which was upheld by the Court of Appeals as a valid exercise of discretion, (Doc. No. 340). The Modified PO reads in part:

[D]ocuments and information protected by the attorney-client privilege or the attorney work product doctrine revealed by petitioner in this habeas corpus proceeding are “Protected Information” and cannot be used for any purpose other than the litigation of petitioner’s writ application. The revelation or use of the Protected Information in the writ proceedings will not be considered a waiver of the attorney-client privilege or work product protection outside of the writ proceedings. However,

¹Robert K. Wong is automatically substituted as a party pursuant to Federal Rule of Civil Procedure 25(d).

Protected Information does not include such documents or information if they were obtained by means independent of the writ proceedings or their protection was waived by some conduct other than their revelation in the writ proceedings. [¶] Protected Information also includes the deposition of Petitioner Ghent.

Pursuant to that order, the Court issued two further orders, which addressed Petitioner's request to seal portions of the record, (Doc. Nos. 342 & 347). In the second of these two orders, the Court noted that "it is important to remember that the relevant waiver of the attorney[-] client[]privilege or work product protection covered by the Modified PO is that of the trial counsel not that of petitioner's habeas attorney." The Court ordered certain documents sealed and found that "[t]he remaining disputed documents do not appear to contain material that constitutes confidential information communicated between petitioner and his trial counsel or trial counsel's work product (i.e., protected information under the Modified PO)."

The Court acknowledged that it "had some discomfort with this order," and it offered Petitioner the opportunity to submit a new motion to seal "if petitioner believes that this order as it now stands will result in specific privileged material being provided to the prosecution in violation of the Modified PO as interpreted by this order." The Court specifically instructed that the briefing in support of any such motion "must identify the specific information that is privileged, why it is privileged and whether it is protected by the attorney-client privilege that existed between petitioner and trial counsel or is trial counsel's work product." Implicit in these directions is that the Court was not offering Petitioner an opportunity to reargue the terms of the Modified PO and subsequent orders in an effort to broaden Protected Information beyond "material that constitutes confidential information communicated between petitioner and his trial counsel or trial counsel's work product."

Now before the Court is that motion, Petitioner's Motion to Seal Portions of the Record. (Doc. No. 351.) The Court has reviewed carefully the parties' briefs and the documents that Petitioner contends should be sealed, as well as the rest of the record on file in this action. Pursuant to the Modified PO and the Court's subsequent orders sealing documents, the Court finds and concludes that the following documents constitute Protected Information; insofar as it pertains to the following documents, Petitioner's Motion is granted, and these documents are

1 hereby ordered sealed.

- 2 • Exhibit T from the evidentiary proffer (a declaration of trial counsel's
3 investigator, Tom Davis, dated February 9, 1993, that discloses privileged
4 communications and protected work product)
- 5 • Exhibit OO from the evidentiary proffer/Exhibit 2 from Respondent's motion in
6 limine/Exhibit 1 from the evidentiary hearing (a declaration of trial counsel, Terry
7 Green, dated May 5, 1988, that discloses work product)
- 8 • Exhibit 7 from Respondent's motion in limine, 146:20–149:20 (part of a
9 deposition of habeas expert witness Charles Marmar, dated July 13, 1998, that
10 discloses Petitioner's deposition)
- 11 • Exhibit 10 from Respondent's motion in limine (notes written by Petitioner to
12 trial counsel that constitute privileged communications)
- 13 • Exhibits 128 and 130 and the last page of Exhibit DDDD from the evidentiary
14 hearing and Evidentiary Hearing Transcript ("EHT") Vol. 7, 1485:13–1487:14
15 (notes written by trial expert witness Stephen Raffle and accompanying testimony
16 that constitute and disclose protected work product, as Respondent acknowledges)
- 17 • The portion of Exhibit EE from the evidentiary hearing that is a memorandum by
18 Davis dated August 25, 1978 (constitutes protected work product)
- 19 • The portion of Exhibit JJJ from the evidentiary hearing that is a memorandum by
20 Davis dated July 20, 1978 (constitutes protected work product)
- 21 • Transcript of the hearing on Respondent's application regarding Petitioner's
22 deposition, dated August 11, 1998, 2:19–25; 3:20–4:14; 12:13–20; 17:10–25;
23 19:24–20:21; 22:2–12; 22:20–23:1; 23:7–15 (discloses Petitioner's deposition)
- 24 • EHT Vol. 6, 1401:2–24; 1402:15–1403:12; Vol. 9, 1810:9–19; 1816:18–21;
25 1818:7–12; Vol. 10, 1925:11–1927:16; 1934:2–13; 1935:6–25; 1938:13–1939:11;
26 1944:5–9; 1952:10–13; 1958:9–1960:5; 1970:21–1971:2; 1974:19–22;
27 1977:4–22; 1978:1–22; 2029:8–2030:1; 2032:24–2033:2; 2054:1–24;
28 2055:11–15; 2056:6–9; 2056:10–15; 2057:10–13; 2076:17–19; 2076:22–2078:23;

1 2083:11–2084:12; 2085:24–2086:4; 2109:24; 2110:21; 2111:7–2112:4;
 2 2123:2–11; 2124:4–8; 2131:25–2131:3; 2143:23–2144:2 (testimony that discloses
 3 protected work product)

- 4 • EHT Vol. 2, 278:15–279:7; 280:7–288:25; 289:25–290:8; 407:4–408:4; Vol. 4,
 5 860:16–874:5; 874:20–876:23; Vol. 6, 1365:4–1365:13; Vol. 7, 1535:3–5;
 6 1535:14–16; Vol. 9, 1848:28–1849:5; Vol. 12, 2309:16–2310:24; 2311:16–21;
 7 2312:1–2312:11; 2347:1–14; 2547:19–2548:3; 2557:23–2560:3 (testimony that
 8 discloses Petitioner’s deposition)
- 9 • EHT Vol. 13, 2603:13–2609:21; 2619:23–2620:8; 2629:1–17; 2631:12–13;
 10 2632:2–2633:10; 2635:11–16; 2638:7–15; 2644:23–2645:8; 2645:21–2646:18;
 11 2648:15–20; 2649:20–21; 2682:18–2684:19; 2685:11–2685:23;
 12 2686:17–2686:19; 2692:5–10; 2705:3–4; 2705:20–21; 2729:4–7; 2737:10–23;
 13 2740:3–6; 2742:18–24; 2744:6–12; 2745:6–9; 2745:15–24; 2773:11–12;
 14 2787:16–21 (argument that discloses privileged communications, protected work
 15 product, and Petitioner’s deposition)

16 Petitioner contends that notes and materials from the expert witnesses who testified on
 17 his behalf at his trial on which they relied in forming their opinions constitute protected work
 18 product. However, while “[o]rdinarily, a party may not . . . discover facts known or opinions
 19 held by an expert who has been retained . . . to prepare for trial and who is not expected to be
 20 called as a witness at trial,” Fed. R. Civ. P. 26(b)(4)(B), a party is entitled to discover the bases
 21 for the opinions posited by expert witnesses who do testify at trial. *Cf.* Fed. R. Civ. P.
 22 26(a)(2)(B) & 26(b)(4)(A). Thus, the moment that Petitioner’s expert witnesses relied on the
 23 documents at issue *at Petitioner’s trial*, they ceased to be protected work product. Since the
 24 documents were not protected work product during Petitioner’s trial, they are not protected work
 25 product now.² Insofar as Petitioner moves to seal these documents, his motion is denied.

27 ²It appears that state law may preclude the use of some or all of these documents at Petitioner’s
 28 retrial. If so, the state court may so order.

1 Petitioner appropriately does not argue that the remainder of the documents he would like
2 sealed are Protected Information. Rather, he contends that they should be sealed nonetheless.
3 The Court previously has considered and rejected the arguments to broaden the Modified PO and
4 subject additional types of documents to being sealed. There is no basis to reconsider those
5 arguments here. Accordingly, insofar as Petitioner moves to seal these documents, his motion
6 also is denied.

7 IT IS SO ORDERED.

8
9 DATED: 3/19/09

Ronald M Whyte
RONALD M. WHYTE
United States District Judge

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28